In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1001

BRYANT PILEDGE LONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial, petitioner was convicted in the United States District Court for the Middle District of Alabama of unlawfully selling seven gallons of whiskey in violation of 26 U.S.C. 5604(a)(1). On October 21, 1966, he was sentenced to imprisonment for three years. The court of appeals affirmed *per curiam* on November 10, 1967 (Pet. App. A). The petition for a writ of certiorari was not filed until January 9, 1968, and is thus out of time under Rule

22(2) of the Rules of this Court. In any event, petitioner's contentions are without merit.

One James Jones, an informer for the Alcohol and Tobacco Tax Division, testified that on March 9, 1966, he telephoned petitioner and ordered 100 gallons of whiskey. Jones thereafter met petitioner at the White Swan Cafe. Petitioner told Jones that he did not have the 100 gallons, but that he did have 7 gallons. Petitioner then requested Jones to follow him to a house on 27th Street, where Jones backed his car into the driveway. They then loaded seven gallons of "moonshine" whiskey into the trunk of Jones' car, and Jones paid petitioner $56.00 (R. I. 13-19). The actual transfer of the whiskey to Jones' car was observed by Deputy Sheriff Lloyd Cantrell of the Muskogee County Sheriff's Department, and a federal agent, John Walters (R. I. 34-37, 47-49).

After Jones had initially arranged for the purchase, he reported that fact to Agent Walters who equipped him with a transmitting device (R. I. 27-28, 45). By use of this device Sheriff Cantrell heard petitioner say to Jones, as they were leaving the White Swan Cafe to get the seven gallons of whiskey, "Follow me down the road; it's not very far" (R. I. 33). Walters, who was also monitoring the conversations, heard petitioner say, "We'll get in the car and we'll go up the road and we'll get the stuff. I don't have it here" (R. I. 47). These two statements, which corroborated similar testimony given by Jones, were received into evidence over petitioner's objection.

1. Petitioner contends that the trial court erred in admitting evidence of the two monitored statements

which corroborated the earlier testimony of the informer. He does not claim (nor could he) that the trial court erred in receiving the same testimony by Jones, with whom he voluntarily conversed. See *Lewis* v. *United States*, 385 U.S. 206; *Hoffa* v. *United States*, 385 U.S. 293. Thus, his argument is only that the substance of Jones' testimony was impermissibly corroborated by the testimony of the agents.

In *Lopez* v. *United States*, 373 U.S. 427, however, this Court squarely held that when one voluntarily speaks to another, he assumes not only the risk that the auditor may repeat the contents of that communication to others, but also the risk that the communication may "be accurately reproduced in court, whether by faultless memory or mechanical recording," 373 U.S. at 439. This Court has since reaffirmed the principle that what "a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States*, No. 35, O.T. 1967, decided December 18, 1967.[1]

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[1] In his concurring opinion *Katz*, Mr. Justice White observed:

> In previous cases, which are undisturbed by today's decision, the Court has upheld, as reasonable under the Fourth Amendment, admission at trial of evidence obtained * * * (2) by a recording device hidden on the person of such an informant, *Lopez* v. *United States*, 373 U.S. 427 (1963); *Osborn* v. *United States*, 385 U.S. 323 (1966); and (3) by a policeman listening to the secret micro-wave transmissions of an agent conversing with the defendant in another location, *On Lee* v. *United States*, 343 U.S. 747 (1952). When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will

The transmitting device here employed was not used either to seize evidence otherwise inaccessible to the government, or to obviate the necessity of putting the informer on the stand; it was used only to verify "* * * the truthfulness of the informer and [to protect] his credibility in this fashion." *Hoffa* v. *United States*, 385 U.S. 293, 317 (Mr. Chief Justice Warren, dissenting on other grounds). The transmitting device was used on but one occasion—during the actual commission of the crime which had been anticipated by the agents. In these circumstances, there is certainly no doubt that *Lopez* is controlling.

2. For the first time in this Court, petitioner contends that the use of the monitoring device violated a regulation of the Federal Communications Commission. That regulation, 47 C.F.R. 15.11 provides:

> (a) No person shall use, either directly or indirectly, a device operated pursuant to the provisions of this part for the purpose of overhearing or recording the private conversations of others unless such use is authorized by all of the parties engaging in the conversation.

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make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates [citation omitted]. It is but a logical and reasonable extension of this principle that a man takes the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another.

In contrast to *Katz* who, the Court found, had justifiably relied upon the privacy of the telephone booth to exclude the "univited ear", petitioner voluntarily assumed the risk that his auditor would consent to the monitoring of those statements.

> (b) Paragraph (a) of this section shall not apply to operations of any law enforcement officers conducted under lawful authority.

See, also, 47 C.F.R. 2.701.

Petitioner asks this Court to construe the phrase, "operations of any law enforcement officers conducted under lawful authority." Under the facts of this case, however, that issue is not reached. The regulations (47 C.F.R. 2.701 and 47 C.F.R. 15.11) apply only to those devices which are subject to regulation by the Federal Communications Commission and by statute (47 U.S.C. 305(a)) all radio devices owned and operated by the United States are exempted from those regulations. Here, the evidence is clear that, the monitoring device was owned and operated by the United States Government, and, this did not come within the FCC regulations.[2]

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[2] There is no merit to petitioner's suggestion, as set forth in his "Questions Presented" (Pet. 3), that the monitoring violated his Fifth Amendment protection against self-incrimination. *Hoffa* v. *United States*, 385 U.S. 293, 303-304.

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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